—**Necessity.**—An instruction to which no exceptions were taken will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.* 1 Va.-W. Va. Enc. Dig. 563; 5 Va.-W. Va. Enc. Dig. 367.]

9. Judgment (§ 184)—On Motion—Notice.—Since pleadings on a motion for a judgment for money after notice, under Code 1904, § 3211, are intended to be very informal, except where statutes require otherwise, as under section 3299, authorizing special pleas of failure of consideration, etc., instructions offered by defendant on the ground that the terms of the notice of the motion for judgment are not such as to warrant recovery on a note made and delivered as collateral to secure payment of a debt to plaintiff from a third party were properly refused.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 346; Dec. Dig. § 184.* 10 Va.-W. Va. Enc. Dig. 126.]

Error to Circuit Court, Mecklenburg County.

Proceeding by notice and motion, under Code 1904, § 3211, brought by the Bank of Mecklenburg and others against Mrs. A. A. Saunders and others to recover judgment on a note. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

John A. Lamb and *Samuel A. Anderson,* for plaintiffs in error.
E. P. Buford and *W. E. Homes,* for defendants in error.

LAMBERT *v.* JENKINS.

June 8, 1911.

[71 S. E. 718.]

1. Courts (§ 91*)—Former Decision—Stare Decisis.—Where, in a prior action between plaintiff, an owner, and a subcontractor, it was material that the court should construe the written contract for the construction of a building between plaintiff and the present defendant, and it was there held, on appeal by the Supreme Court, that defendant was an independent original contractor, and not plaintiff's agent in the employment of the subcontractor, and that plaintiff could not, therefore, recover against such subcontractor, the court, in the subsequent action by plaintiff against defendant in construing the same contract, properly held that defendant was an independent contractor, and that the subcontractor was defendant's agent, though defendant was no party to the prior suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.* 12 Va.-W. Va. Eng. Dig. 722, 725.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

2. Contracts (§ 198*)—Original Contractor—Materials—Guaranty—Instructions.—Where a contractor for a building guaranteed that the workmanship should be first-class and satisfactory in every respect, and plaintiff sued for damages caused by the failure of a subcontractor to provide proper materials for the construction of a granolithic floor, a request to charge that defendant contractor was not a guarantor that the floor would be perfect, but only agreed to use his best knowledge, skill, judgment, and energy in the business, and if he did that, and kept all the other parts of the contract with reference to workmanship, the jury should find for him, was properly refused, as contrary to the terms of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861-883; Dec. Dig. § 198.* 7 Va.-W. Va. Enc. Dig. 714; 3 Va.-W. Va. Enc. Dig. 405.]

3. Contracts (§ 198*)—Building Contracts—Guaranty of Workmanship—Materials—"Workmanship."—Where a contractor for the construction of a building guaranteed that the workmanship should be first-class and satisfactory in every respect, the term "workmanship," as used in such guaranty, was sufficient to protect the owner against the use of bad or unsuitable materials by a subcontractor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861-883; Dec. Dig. § 198.* 3 Va.-W. Va. Enc. Dig. 405.]

4. Damages (§ 123*)—Breach of Contract—Measure.—Where a contractor for the construction of a building guaranteed that the workmanship should be first-class, and a granolithic floor put in by a subcontractor was soft and defective, the court properly charged that the owner's measure of damages was such a sum as it would reasonably take to make the floor conform to the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 320-325; Dec. Dig. § 123.* 4 Va.-W. Va. Enc. Dig. 184.]

5. Trial (§ 252*)—Instructions—Evidence.—In an action against a contractor for damages because of a defective granolithic floor in a building constructed by a subcontractor, defendant was not entitled to an instruction as to his right to set off the value of other work done by such contractor, where there was no offer of evidence at the trial as to the cost or value of such work; and this, notwithstanding the jury saw the same, and by taking measurements could have placed a valuation thereon.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.* 7 Va.-W. Va. Enc. Dig. 718.]

6. Principal and Agent (§ 182*)—Notice to Agent—Evidence—Statements Made to Agent.—In an action against a contractor for damages resulting from a defective floor in a building constructed by a subcontractor, the latter being the agent of the contractor, the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

owner was entitled to testify that he complained to such subcontractor, and told him that the floor could not be used, that it was soft, and did not seem right.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 182.* 1 Va.-W. Va. Enc. Dig. 275, 282.]

7. Appeal and Error (§ 1051*)—Evidence—Prejudice.—Where, in an action for damages caused by the defective construction of the floor in a building, the jury were permitted to view the premises, defendant was not prejudiced by the introduction of photographs thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.* 1 Va. W. Va. Enc. Dig. 592.]

Error to Law and Equity Court of City of Richmond.

Action by L. H. Jenkins against George W. Lambert. Judgment for plaintiff, and defendant brings error. Affirmed.

W. L. Royall, for plaintiff in error.
Garnett & Pollard, for defendant in error.

MARBURY et al. *v.* JONES et al.

Sept. 14, 1911.

[71 S. E. 1124.]

1. Mortgages (§ 372*)—Agreements by Mortgagor—Effect—Title of Purchaser.—An agreement by a mortgagor, after giving the deed of trust, does not affect the rights of the trustee or his purchaser.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 372.* See also 10 Va.-W. Va. Enc. Dig. 63.]

2. Adverse Possession (§ 46*)—Interruption.—P., being in possession under a deed from defendant, made an agreement verbally acknowledging plaintiff's ownership, without defendant's knowledge. Later P. mortgaged the land, and defendant purchased under the deed of trust. Held, that the parol agreement did not interrupt defendant's adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 46.* 1 Va.-W. Va. Enc. Dig. 208; 14 id. 23.]

3. Trial (§ 296*)—Instructions—Cure of Error.—Omission from an instruction of holding under color of title as an element of adverse possession was cured by another instruction requiring that element.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.* 1 Va.-W. Va. Enc. Dig. 206; 7 id. 743.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.